BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICK J. ROSKILLY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,661
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE CO. STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the September 5, 2003 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits based upon a 10 percent functional impairment to the body as a whole after the Administrative Law Judge determined that claimant had returned to work for respondent in an unaccommodated position and was limited to his functional impairment pursuant to *Watkins.*[1] The Appeals Board (Board) heard oral argument on February 17, 2004.

APPEARANCES

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

What is the nature and extent of claimant's injury? And more particularly, did claimant return to an unaccommodated job? If so, is claimant precluded from a permanent

[1] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

partial general disability based upon his loss of task performing ability averaged together with claimant's loss of wages under K.S.A. 44-510e because he returned to an unaccommodated position with respondent? Claimant contends that *Watkins* should not apply to the present definition of permanent partial disability and that claimant should be entitled to a work disability based upon the average of a 100 percent wage loss and a 62 percent task loss, for an 81 percent permanent partial general disability.

Respondent, on the other hand, contends that the Award denying claimant a permanent partial general disability beyond his functional impairment should be affirmed for the reasons set forth in *Watkins*. Respondent further argues that if *Watkins* does not apply, claimant should be imputed a wage, having failed to put forth a good faith effort to find work. Respondent argues that claimant has the ability to earn $9 per hour, which would result in a wage loss of 67 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record contained herein, the Board finds as follows:

Claimant began working for respondent in 1988. By October 25, 2001, claimant was working as a PCA in Department 613. Claimant testified that on October 25, 2001, while lifting parts (which he estimated weighed between 50 and 75 pounds), he suffered injury to his low back.

Claimant reported the injury to Central Medical and was placed under restrictions. He was referred to Dr. Bernard T. Poole, who provided treatment through January 7, 2002, including physical therapy. He was transferred to the care of Paul S. Stein, M.D., board certified in neurological surgery, with the first examination occurring on January 15, 2002. Dr. Stein continued treating claimant through April 8, 2002. Claimant was diagnosed with lumbar strain with possible lumbar disc disease. Claimant underwent x-rays and an MRI scan of the low back, with the MRI scan revealing fairly severe degenerative change in the low back, and narrowing of the disc spaces between the third and fourth, and fourth and fifth lumbar vertebrae, resulting in irritation of the nerve. X-rays of the hips were interpreted as normal.

Claimant underwent conservative care, including two epidural blocks and physical therapy. By April 8, 2002, claimant indicated to Dr. Stein that he was much improved, with relatively little discomfort. Dr. Stein felt under the circumstances, claimant had no functional impairment and required no restrictions in his ability to return to work. Dr. Stein acknowledged at his deposition that he was unaware of claimant's then current symptoms. He agreed, on cross-examination, that claimant would have an impairment under the

American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), if, after Dr. Stein last saw him, claimant displayed symptoms of significant pain, physiological derangement, restriction of motion, muscular spasm, neurological deficit in the form of reflex, motor or sensory deficits, or all of the above. Dr. Stein acknowledged that the injury suffered by claimant in October of 2001 was superimposed upon claimant's preexisting degenerative problems and could possibly have aggravated those conditions, making them symptomatic.

It is noteworthy that claimant suffered an earlier injury to his back while working on the railroad in 1983. Claimant testified, however, that he fully recovered from that injury. Claimant acknowledged that as a result of the 1983 injury, he was forced to learn to lift with better body mechanics.

Despite the restrictions of Dr. Klein, claimant was able to return to his regular job employment with respondent in Department 613 as a PCA and was working in that capacity on December 14, 2001, when he was laid off as a result of an economic layoff. However, the restrictions later recommended by Dr. Murati would have precluded claimant from performing all of his regular duties. After being laid off, claimant sought employment at other locations. However, at the regular hearing on March 10, 2003, claimant was only able to verify twenty-one separate contacts over approximately a 63-week period.

Claimant was referred by his attorney for a May 22, 2002 examination with Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. At that time, claimant had low back pain complaints with shooting pain into both legs, pain in both hips and numbness in both legs, with the right being worse than the left. Dr. Murati diagnosed claimant with spinal stenosis at L3-4 and left SI joint dysfunction, both as a direct result of the October 25, 2001 work injury. He restricted claimant to bending rarely and prohibited crawling. He limited claimant to occasional sitting, climbing stairs, climbing ladders, squatting and driving, with frequent standing and walking allowed. He limited claimant's occasional lifting to a maximum of 35 pounds and frequent lifting up to 20 pounds. Pursuant to the AMA *Guides* (4th ed.), he found claimant to have a 10 percent impairment to the body as a whole under the DRE lumbosacral category III.

Dr. Murati reviewed a task list created by vocational expert Jerry Hardin and opined that claimant had suffered a 62 percent loss of tasks. He acknowledged claimant had preexisting degenerative difficulties and further agreed that claimant was morbidly obese, being described as weighing approximately 340 pounds.

As a result of the conflicting medical opinions, claimant was referred by the Administrative Law Judge for an independent medical examination to board certified orthopedic surgeon C. Reiff Brown, M.D. This examination, on September 10, 2002, resulted in a report from Dr. Brown of that same date. Dr. Brown diagnosed moderate degenerative narrowing at L5-S1, with mild degenerative narrowing at L4-5. There was

degenerative desiccation of the lower four lumbar segments, with hypertrophic changes at L2-3, 3-4, 4-5 and L5-S1. There was mild protrusion of the L3-4 intervertebral disc and a protrusion of the L4-5 disc on the right. Spinal stenosis of the canal was noted at that level, with a mild bulge at L5-S1.

Dr. Brown agreed with Dr. Murati that claimant had a 10 percent impairment to the body as a whole under DRE lumbosacral category III. However, Dr. Brown went on to state that in his opinion, 5 percent of claimant's impairment preexisted the October 25, 2001 injury, noting in his report that prior to the October 2001 injury, claimant had a symptomatic back, which would have resulted in his placement in DRE category II, therefore, resulting in the 5 percent preexisting impairment.[2] Dr. Brown restricted claimant from lifting above 50 pounds occasionally and 30 pounds frequently and advised he avoid frequent flexion more than 30 degrees. Dr. Brown did not express an opinion in his report regarding what, if any, task loss claimant may have suffered.

Respondent took the deposition of Bill Hosman, a vocational rehabilitation counselor employed by IAM CREST and assigned to the respondent. Mr. Hosman testified that he worked for the International Association of Machinists and was an employee of that union, rather than an employee of respondent. He reviewed the limitations placed upon claimant by the various physicians, finding that the material processor job that claimant was working at the time of accident and as of his last day worked fell within the restrictions placed upon claimant by Dr. Brown. He testified that claimant would be capable of returning to work in that job without accommodation. A job description (testified to by Mr. Hosman) indicated that, at no time, would claimant have to lift more than 25 pounds by himself.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[4]

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[2] K.S.A. 44-501(c).

[3] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

K.S.A. 44-510e(a) defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Dr. Murati and Dr. Brown found claimant to have suffered a 10 percent impairment of function to the body as a whole due to the injuries suffered on October 25, 2001. The Board affirms that finding.

K.S.A. 44-501(c) states as follows:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Claimant suffered a significant injury in 1983 while working for the railroad. That injury to his low back caused claimant ongoing symptoms, at least according to the history provided by claimant to Dr. Brown. Claimant, however, testified differently at the regular hearing. Dr. Brown's report notes that claimant was forced to learn to lift with proper body mechanics because of the ongoing pain. Claimant did acknowledge that his lifting was done with proper body mechanics. Dr. Brown went on to state that the preexisting impairment suffered by claimant would qualify claimant under DRE category II for a 5 percent impairment, which he opined was appropriate under this circumstance. The Board finds that the opinion of Dr. Brown regarding claimant's preexisting impairment is the most credible in the record. Accordingly, the Board finds claimant sustained an additional 5 percent impairment to the body as a whole as a result of the injuries suffered on October 25, 2001.

Respondent next argues, and the Administrative Law Judge agreed, that the policies set forth in *Watkins* apply in this instance as claimant was returned to work for respondent at the same job he was working at the time of the injury, apparently without accommodation. The Board acknowledges the Kansas Court of Appeals has not been consistent in applying *Watkins* to K.S.A. 44-510e. That statute's language was modified in 1993, with the date of accident in *Watkins* occurring prior to that time. The significant dispute is whether the rule of *Watkins* would apply to the revised language of K.S.A. 44-510e.

The court in *Watkins* found the claimant was precluded from receiving a work disability award where he had returned to his same job earning the same wage as before

his accident. At that time, the statute defined permanent partial general disability (work disability) as:

> . . . the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)[5]

The court reasoned that because the claimant had demonstrated the ability to perform work in the open labor market, i.e., an unaccommodated job, and to earn comparable wages, then he did not meet this definition of being disabled. Accordingly, his disability award was limited to his percentage of functional impairment. As a result of the 1993 amendments to K.S.A. 44-510e, the court's reasoning in *Watkins* no longer applies. The statutory definition of work disability now reads:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)[6]

It is no longer an ability test, at least not in the sense of being applicable to the prospective job market, that is from the date of accident forward. Putting aside for the moment the question of good faith, to the extent ability is still a factor under the current statute, it is retrospective, instead of prospective. That is because the extent to which the injured worker's ability to work has been impacted is measured by the loss of actual job tasks the worker performed in any substantial gainful employment during the fifteen-year period preceding the accident. The loss is no longer measured by the total open labor market that exists after the accident. The rationale for this change was to get away from hypothetical jobs which the worker may or may not have had the education, training or

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[5] K.S.A. 1992 Supp. 44-510e(a).

[6] K.S.A. 44-510e(a).

experience to perform, and to, instead, utilize jobs the worker actually performed. The effect of this change is to render meaningless the distinction between accommodated and unaccommodated jobs, except to the extent that the concepts impact the task loss analysis. Accordingly, it is only in the situation where the injured worker had worked exclusively in the same job for the entire fifteen years preceding the accident that the successful return to that same unaccommodated job would establish a prima facie case for no work disability.

In short, *Watkins* involved a different definition of work disability. The former version of K.S.A. 44-510e involved an ability test both as to jobs and wages, and *Watkins* is premised on that ability test. This distinction has been recognized by the Court of Appeals.

> Currently, ability or capacity to earn wages only becomes a factor when a finding is made that a good faith effort to find appropriate employment has not been made. *Copeland v. Johnson Group, Inc.,* 26 Kan. App. 2d 803, 804, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000). Once a finding has been made that the claimant has established a good faith effort, the difference in pre- and post-injury wages can be based on the actual wages made. *Copeland*, 26 Kan. App. 2d at 804.[7]

The Kansas Court of Appeals, in the recent case of *Beck,*[8] discussed the application of post-1993 K.S.A. 44-510e. In *Beck*, the claimant was terminated as a result of what may have been improper activities by a supervisor. The court, in *Beck*, citing *Gadberry*,[9] held that an employee terminated due to reasons other than her injury was not precluded from an award of wage loss for work disability benefits, even though returned to work in an unaccommodated position.

> A claimant's work restrictions do not cease when his or her job ends; rather the claimant's work disability makes it difficult for the claimant to obtain work in the open labor market. Thus, once a claimant has proven a work disability, the issue becomes whether a good faith effort was made to obtain employment.[10]

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[7] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *see also Sharp v. Custom Campers, Inc.*, 31 Kan. App. 772, 74 P.3d 42 (2003).

[8] *Beck v. MCI Business Services, Inc.,* 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* ___ Kan. ___ (2003).

[9] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[10] *Chowning v. Cannon Valley Woodwork, Inc.*, Docket No. 90,572, unpublished opinion filed Feb. 27, 2004 (motion to publish Court of Appeals decision granted May 25, 2004).

The Board finds based upon the logic of *Beck, Helmstetter, Gadberry* and *Chowning*, that *Watkins* does not apply to the current version of K.S.A. 44-510e and that claimant's loss of employment, even though due to reasons other than his injury, does not preclude an award of work disability.

K.S.A. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In this instance, there are two task loss opinions in the record. The first, from Dr. Stein (claimant's treating physician), indicates that claimant suffered no permanent impairment and required no restrictions, therefore resulting in no loss of task performing ability. However, Dr. Stein acknowledged, on cross-examination, that if claimant's symptoms had increased subsequent to his last examination of claimant, that claimant may be eligible under the AMA *Guides* (4th ed.) for an impairment. This suggests that claimant would also be subject to some limitation as to his task performing abilities.

Dr. Murati, in reviewing the task list of Mr. Hardin, found claimant to have sustained a 62 percent task loss as a result of the injuries suffered on October 25, 2001. The Board finds the opinion of Dr. Murati to be credible and adopts same in concluding claimant has a 62 percent task loss.

The permanent partial disability statute requires the Board to consider what, if any, loss of wages claimant has suffered. That statute, however, must be read in light of both *Foulk*[11] and *Copeland*.[12] The Kansas appellate courts have barred claimants from receiving work disability benefits if a claimant is capable of earning 90 percent or more of the pre-injury wage at a job within his or her medical restrictions, but either actively or constructively refuses to do so. In this instance, the Board does not find *Foulk* to apply, as claimant's layoff was clearly beyond his control. However, the Board must also consider the Court of Appeals' opinion in *Copeland*. In *Copeland*, the Court of Appeals held that workers are required to make a good faith effort to obtain employment once leaving the job at which they were injured. Should it be found that a worker's post-injury efforts do not

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

constitute a good faith effort to find appropriate employment, then the finder of fact must determine an appropriate post-injury wage based upon all the evidence before it.

Here, claimant argued that he put forth a good faith effort to find a job after leaving respondent. However, when pressed, claimant was only able to identify twenty-one contacts in the 63 weeks leading up to the regular hearing. This constitutes less than one contact per week and, in the Board's opinion, does not constitute a good faith effort to find employment. The Board will, therefore, impute a post-injury wage pursuant to K.S.A. 44-510e.

Jerry Hardin opined claimant had the ability to earn $9 per hour, which equates to a weekly wage of $360. This, when compared to claimant's agreed upon wage of $1,098.08, results in a 67 percent wage loss. In averaging claimant's 62 percent task loss and 67 percent wage loss, the Board finds claimant to have suffered a 64.5 percent permanent partial general disability as a result of the injuries suffered on October 25, 2001.

The Board, therefore, finds that the September 5, 2003 Award of Administrative Law Judge John D. Clark should be modified to award claimant a functional impairment of 5 percent to the body as a whole, with a work disability of 64.5 percent. Pursuant to K.S.A. 44-501(c) and the opinion of Dr. Brown regarding claimant's preexisting functional impairment of 5 percent to the body, claimant's award is reduced to a 59.5 percent permanent partial disability to the body.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 5, 2003, should be, and is hereby, modified, and claimant is awarded a 5 percent functional impairment, followed thereafter by a 59.5 percent permanent partial general disability for the injuries suffered on October 25, 2001, and based upon an average weekly wage of $1,098.08.

Claimant is entitled to 239.81 weeks of permanent partial general disability compensation at the rate of $417 per week, for a maximum award of $100,000.00.

As of February 26, 2004, claimant is entitled to 121.86 weeks of permanent partial general disability compensation at the rate of $417 per week totaling $50,874.00, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, claimant is entitled to 117.808 weeks of permanent partial general disability compensation at the rate of $417 per week totaling $49,126.00, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority regarding the application of *Watkins* to the post-1993 version of K.S.A. 44-510e. While the majority cites *Beck*,[13] the undersigned would cite the more recent Kansas Court of Appeals decision in *Tallman,*[14] wherein it was held that *Watkins* does apply to the current version of K.S.A. 44-510e. This fact situation is relatively straight forward, with claimant being returned to work by the treating physician and by the court-ordered IME doctor to a job which he was able to perform without accommodation. Claimant's layoff was clearly economic in nature and had nothing to do with claimant's ongoing injury.

The Kansas Court of Appeals, in *Newman*,[15] also found the application of *Watkins* to apply to the recent version of K.S.A. 44-501e's work disability. The court, in *Newman*, distinguishing cases which refused to apply *Watkins*, found that the claimant's return to

[13] *Beck*, *supra*.

[14] *Tallman v. Case Corp.*, 31 Kan. App. 2d 1044, 77 P.3d 494 (2003).

[15] *Newman v. Kansas Enterprises,* 31 Kan. App. 2d 929, 77 P.3d 494 (2002).

work in an unaccommodated position, displaying the ability to perform the same tasks for the same pay preclude the claimant from entitlement to a substantial work disability.

This Board Member acknowledges that there are cases which refuse to apply *Watkins* to the new version of K.S.A. 44-510e. However, with the current state of the case law on this issue, this Board Member finds sufficient support to apply *Watkins* to the post-1993 version of K.S.A. 44-510e and would preclude this claimant from a work disability, limiting him instead to his percentage of functional impairment.

BOARD MEMBER

c: Davis H. Farris, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director